

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0096, State of NH v. Otis Daniels, the court on November 24, 2004, issued the following order:

Following a jury trial, the defendant, Otis Daniels, was convicted on two counts of felonious sexual assault. See RSA 632-A:3, II (1996). On appeal, he contends that the trial court erred in denying his motion to suppress out-of-court photo identifications by the juvenile victims. We affirm.

Having claimed that his rights to due process under the State and Federal Constitutions were violated, the defendant bears the burden of proving that the out-of-court procedure was unnecessarily suggestive. State v. Rezk, 135 N.H. 599, 601 (1992). We will not overturn the trial court's ruling unless it is contrary to the weight of the evidence. See id.

The defendant argues that his photograph is unnecessarily suggestive because the background of his picture is lighter than the seven others in the array, he is the only male with braided hair and he is one of only two who are directly facing the camera. We have previously held that variation in appearance among persons or photographs does not invalidate a pretrial identification. See State v. Duff, 129 N.H. 731, 735 (1987). To require reversal on such grounds, the "procedure must have been so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Id. (quotations omitted). The trial court concluded that the array was not unfairly suggestive, finding that the difference in backgrounds was not marked, that a variety of hairstyles were represented and that the photos were presented to each victim separately. Having reviewed the record before us, we conclude that the defendant has failed to establish that the photo array created a very substantial likelihood of irreparable misidentification.

Affirmed.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**

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